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IN THE

Supreme Court of the United States

October Term, 1953.

No. 556

JAMES F. HICKEY, an Individual and
BANKERS SECURITIES CORPORATION, a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, James F. Hickey, an individual, and Bankers Securities Corporation, a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on October 14, 1953, reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW.

The opinion of the District Court (R-720)[1] denying respondent's motion for a new trial is not reported.

Neither the opinion of the Court of Appeals (R. 731) nor its order amending the said opinion (R. 772) are reported.

1. As required by the rules of the Court of Appeals for the Third Circuit, the record was printed as Appendices to the briefs of the parties in that Court and the pages numbered "1a, 2a", etc. In this Petition, record references are cited simply as R-1, R-2, etc., omitting the "a", but the references are to the indicated numbered pages in the Appendix-record.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 14, 1953 (R-731), Judge Goodrich dissenting (R-746). The order of the Court of Appeals correcting its opinion and denying petitioners' timely Petition for Rehearing (R-748) was entered on December 11, 1953 (R-772).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

STATUTES INVOLVED.

The relevant statutes are:

(1) The Acts of August 1, 1888, c. 728, § 1, 25 Stat. 357; March 3, 1911, c. 231, § 291, 36 Stat. 1167; and June 25, 1948, c. 646, § 6, 62 Stat. 986, 40 U. S. C. § 257, authorizing the condemnation by the United States Government of real estate required for public use.

(2) The Acts of August 1, 1888, c. 728, § 2, 25 Stat. 357, and of March 3, 1911, c. 231, § 291, 36 Stat. 1167, 40 U. S. C. § 258, requiring federal condemnation proceedings to conform, as near as might be, to state practice and pleading. These statutes governed the trial of this case, although they have now been superseded by Rule 71A of the Federal Rules of Civil Procedure, making those rules applicable to condemnation cases except as specifically provided in said Rule 71A. Under either the former Rule 81 (a) (7) or the present Rule 71A, the Federal Rules governed the appeal.

(3) The Declaration of Taking Act of February 26, 1931, c. 307, § 1, 46 Stat. 1421, 40 U. S. C. § 258a, specifying the procedure for surrender of possession of the condemned property to the Government, payment of the estimated just compensation into court, etc.

(4) Rule 61 of the Federal Rules of Civil Procedure, 28 U. S. C. § 61, which was a codification of the former "harmless error" statutes and rules.

(5) The Act of May 24, 1949, c. 139, § 110, 63 Stat. 105, 28 U. S. C. § 2111, the new "harmless error" statute.

Of course the case is one based on that part of the Fifth Amendment providing that " . . . nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED.

(1) Was the Court of Appeals' reversal of the judgment entered on the jury verdict in conflict with and contrary to Rule 61 (entitled "harmless error"), as interpreted by this Court, and the rule uniformly followed by the Courts of Appeals (including the court below) that in condemnation cases such judgments will not be disturbed on appeal unless clearly erroneous or unless the trial judge clearly abuses his discretion in rulings on evidence? [2]

(2) Was the Court of Appeals' reversal of the judgment entered on this jury verdict based on such a flagrant misstatement of the evidence and the District Court's rulings thereon as to require review and reversal by this Court pursuant to its supervisory powers?

STATEMENT OF THE CASE.

On February 6, 1951 the United States condemned property belonging to petitioners and located at 18th and Locust Streets in downtown Philadelphia. It consisted of a lot 195 feet by 175 feet, upon which there was erected a fourteen-story building completed in 1926 (R-25). The original cost of the land was $1,250,000 and the building and furnishings originally cost approximately $7,000,000 (R-144).

A Board of View (R-724) awarded petitioners $2,865,000 as just compensation. The Government appealed and a

2. Of course petitioners still contend that the Court of Appeals misstated the evidence and the rulings of the District Court thereon, as is demonstrated by their Petition for Rehearing (R-748). The Court of Appeals corrected its opinion in several respects (R-772) but left the most important misstatements uncorrected. See No. 2 of "Questions Presented"; and see Petition for Rehearing (R-748).

jury awarded petitioners $2,100,000 (R-717) in a trial *de novo* in the United States District Court for the Eastern District of Pennsylvania. The District Court denied the Government's motion for a new trial (R-720).

The Court of Appeals for the Third Circuit reversed the judgment of the District Court (R-731) and denied petitioner's timely Petition for Rehearing (R-748). The matter is before this Court on certiorari to review that judgment of the Court of Appeals.

At a pre-trial conference, over objection by petitioners' counsel, the Court agreed to receive at the trial evidence concerning the extent of allegedly needed repairs to the building, and Government counsel agreed that the estimated cost should not be introduced or admitted (see pages 48-50 of the transcript included in the record certified to this Court, said pages being printed as an appendix to this petition (page 23).

The case was first tried by Ganey, J., and a jury from May 19 to May 23, 1952 and was concluded by the withdrawal of a juror on the latter date (R-4). The second trial before Ganey, J., and a jury was held from June 2, 1952 to June 9, 1952. On the latter date the jury returned a verdict in favor of petitioners in the sum of $2,100,000.00 (R-717). The Government's motion for a new trial was denied in an opinion dated September 18, 1952 (R-720).

At the trial the petitioners produced the testimony of Clarence S. Thalheimer, an architect, who had visited the property at least fifteen times between 1948 and 1951 (R-38); and the following expert real estate brokers, all experienced in buying and selling central Philadelphia real estate, who valued the property as follows: Albert M. Greenfield, Chairman of the Board of petitioner Bankers Securities Corporation, forty-five years experience (R-47), $3,850,000 (R-61); C. Harry Johnson, forty years experience (R-155), $3,325,000 (R-172); Samuel T. Hall, forty years experience (R-219), $3,250,000 (R-238); and Boyd T.

Barnard, thirty-three years experience (R-251), $3,150,000 (R-268).

The Government offered testimony of three real estate men who had little experience in appraising and absolutely no experience in buying or selling real estate in central Philadelphia (Barber, R-334; Reilly, R-501); Haeberle, R-548) and whose valuations of the property as of the time of taking were: Earle N. Barber $1,575,000 (R. 344); John J. Reilly $1,550,000 (R-493); and Harry L. Haeberle $1,-500,000 (R. 548).

The Government also called (1) a photographer, E. H. Swenson, who had wanted to take pictures of the interior of the condemned building to "show the thing in general", but was supervised by another Government employee who "picked out things that didn't look good, which I photographed" (R-308), (Mr. Swenson's pictures were, with few exceptions, admitted in evidence (R-419); (2) H. H. Phillips, an architect; (3) E. G. Storey, a mechanical engineer; and (4) Anthony Marolda, an employee of the District Engineer's Office of the United States Army.

After hearing the testimony with such attention as to merit "thanks" by Government counsel (R-718) and being told by him that "now you have everything you need to really pass judgment on this case" (R. 654), the jury brought in the verdict of $2,100,000.00 for petitioners (R-717). Although this was $765,000.00 less than the Board of View award (R-727), the owners accepted the jury's determination. The Government persisted in its motion for a new trial (R-5).

The trial judge denied the Government's motion for a new trial stating (R-720) that (1) "a careful review of the evidence shows that the verdict was not excessive but, in the opinion of the Court, a fair one", pointing out that "competent real estate experts, eminent in their field" had fixed much higher values, (2) "in addition to the testimony of experts, the jury had the benefit of architects and engineers

on both sides who supplemented the judgment of the real estate experts, with respect to the physical condition of the property, as well to its present condition as its effect [sic] on its highest and best use" (R-721) and (3) that "a review of the record indicates a verdict by the jury founded upon credible, competent evidence" (R-721).

The Government paid $2,100,000 into Court by adding $850,000 to its original deposit of $1,250,000 (R-6) but persisted in its appeal to the Court of Appeals (R-5).

The Court of Appeals found no fault with (1) the qualifications of petitioners' valuation experts, (2) the basis for their appraisals of the property, (3) the amount of their valuations, or (4) the District Court's rulings and charge defining the crucial terms "just compensation" and "fair market value". In these basic matters, on which the jury's verdict really depends, the Court of Appeals could find no error.

Reversal of the judgment was based on four alleged[3] rulings as to the admission of evidence.

(1) The trial court's alleged refusal to permit Government counsel to cross-examine *one* of petitioners' *four* valuation witnesses as to the sums necessary to be expended to repair and convert the building for its highest and best use, a question previously answered by petitioners' three other valuation witnesses.

(2) The trial court's alleged refusal to permit *one* of *three* Government valuation witnesses to state the sums necessary to be expended to repair and convert the building, a figure previously stated by the two other Government valuation witnesses.

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3. Petitioners contend, and demonstrated in the Petition for Rehearing in the Court of Appeals, that that Court misstated the evidence and the District Court's rulings thereon. However, for purposes of the first "Question Presented" to this Court, petitioners assume *arguendo* that such is not the case and contend that, nevertheless, the Court of Appeals should be reversed because it ignored Rule 61 as interpreted by this Court and uniformly applied by Courts of Appeals.

(3) The trial court's alleged striking out of testimony of Government engineer, Storey, on re-direct examination, as to whether or not subsequent events bore out his opinion, given in detail in direct and in cross-examination, that the building's plumbing and heating systems were in bad repair.

(4) The trial court's refusal to hear testimony by Steiger, a tax assessor, who proposed to rebut testimony by Mr. Greenfield, Chairman of the Board of petitioner Bankers Securities Corporation, that the condemnee as well as real estate men and taxing officials in Pennsylvania recognize a difference between "fair market value" for condemnation purposes, and "market value" in tax assessment proceedings.

Judge Goodrich dissented (R-746) holding that the alleged errors relied upon by the majority were "not of sufficient consequence to require another trial of the case in which the questions were thoroughly and, to me, fairly covered in the original litigation".

In a timely Petition for Rehearing (R-748) petitioners pointed out that the grounds for reversal relied upon by the Court of Appeals were based on misstatements of the evidence and of the trial court's rulings thereon. Petitioners also emphasized that, even if the alleged errors had actually been committed, they were not substantial, obviously had not affected the verdict (which inclined much more to the Government's valuations than to petitioners'), and that, both under the general rule and under Rule 61, the judgment could not properly be reversed on such grounds.

Nevertheless, although it corrected some errors in its opinion, the Court of Appeals denied the Petition for Rehearing (R-772).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Third Circuit erred in the following respects:

(1) In reversing the judgment of the trial Court entered on a jury verdict favorable to the Government and based on substantial evidence, where the jury heard all the competent evidence and the only errors alleged were on questions as to admission of evidence which were within the discretion of the trial court.

(2) In stating that the trial Court committed reversible error by allegedly limiting the Government in its cross-examination of one of the petitioners' four valuation witnesses concerning the cost of repairs and conversion of the building on the condemned property.

(3) In stating that the trial court committed reversible error by allegedly refusing to allow the Government to question one of its three valuation witnesses as to the cost of repairs and conversion.

(4) In stating that the trial Court's action in sustaining an objection to the one question asked, and already answered, by the Government of its witness, Storey, on re-direct examination, was prejudicial error.

(5) In stating that the trial Court's action in refusing to permit a real estate assessor to attempt to contradict testimony as to the owners' and others' opinions of "fair market value" in condemnation cases contrasted with "market value" in tax assessment cases seriously prejudiced the Government.

(6) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

More than a century ago this Court said in a condemnation case such as this:

> "The question presented is not whether the United States has power to condemn and appropriate this property . . ., for that is conceded, but *how much* it *must* pay as compensation therefor. Obviously, *this question,* as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, *is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.*" *Monongahela Navigation Company v. United States,* 148 U. S. 312, 324. (Emphasis added.)

What becomes of this security of the individual in the use and enjoyment of his property when he

(1) surrenders it without complaint,

(2) submits the issue of just compensation to the appropriate tribunal (a Board of View, in this case) and accepts that tribunal's decision,

(3) institutes suit as required by the Court when the Government refused to accept the Board of View's appraisal,

(4) tries the case twice to a judge and jury, and accepts the verdict, and then

(5) almost three years after the taking, finds himself right back where he started from, not because of any deficiency in his proof of value, or any excessiveness of the jury verdict, or any fundamental error of law by the trial court, but because, in a week-long trial, producing over 700 printed

pages of testimony by fifteen witnesses, the trial judge, in his discretion, allegedly[4] refused to permit Government counsel to ask *four particular questions?*

That is what happened in this case.

Despite the conscientious manner in which the District Court tried this case; despite the admitted total absence of any error on the fundamental issue of value; despite the fullest exploration of every phase of that issue by both sides; and despite the verdict $765,000 less than the award of the Board of View, $1,050,000 less than petitioners' lowest appraisal, and only $550,000 higher than two of the Government's appraisals; despite all these things, the Court of Appeals has, over Judge Goodrich's dissent, scrapped the jury verdict approved by the District Court, and ordered a new trial because of the trial court's rulings on only *four questions* on matters within his discretion as to the admission of evidence.

Petitioners earnestly submit that this Court should reverse this decision of the Court of Appeals for the following reasons:

1. (a) The decision below is in conflict with the letter and the spirit of Rule 61 of the Federal Rules of Civil Procedure,[5] and with this Court's most recent interpretation of that rule.

Judge Goodrich, in his dissent below (R-746), paraphrased what this Court said only recently about the "harmless error" rule promulgated in Rule 61. Judge Goodrich simply said:

> "It seems to me that the errors which are relied upon for reversal are not of sufficient consequence to require another trial of the case in which the questions were thoroughly and, to me, fairly covered in the original litigation."

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4. See Notes 2 and 3.
5. See text of Rule 61 at Appendix to this petition, page 23.

This Court's most recent detailed consideration of this question is to the same effect:

> " . . . the question is . . . what effect the errors had or reasonably may be taken to have had upon the jury's decision . . . The crucial thing is the impact of the things done wrong *on the minds of other men, not on one's own, in the total setting . . . This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened* . . . If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, *the verdict and judgment should stand.*" *Kotteakos v. United States,* 328 U. S. 750, 764. (Emphasis added.)

Petitioners submit that it cannot seriously be contended that the *four questions* alleged to have been erroneously ruled upon by the trial court had any effect on this jury in the "total setting" of this week-long, 700 page trial. Their verdict was well within the range of the evidence and in fact favorable to the Government. It was more than $1,000,000 *less* than the valuation of petitioners' *lowest* appraisal and only $550,000 higher than two of the Government's appraisals. Moreover, none of the four questions picked out of the 700 page record had any direct bearing on the issue of value and all of them considered together could not have affected the jury's verdict on that issue. The four alleged errors relied upon by the Court of Appeals (see pages 6-7 of this petition) are treated seriatim below:

(1) Even if the cost of repairs and conversion bulked large in the jury's mind, the trial Court's alleged [6] refusal to permit Government counsel to ask petitioners' witness Barnard for his figure could not have been prejudicial because (a) three of petitioners' other witnesses had already answered this question (Greenfield, R-120; Johnson, R-204,

6. See Notes 2 and 3.

R-205; Hall, R-242, R-249); (b) Barnard *had no exact figure of his own* (R-283). How could the jury be influenced by not hearing Barnard say "*I did not make a specific estimate*"? (R-283) and see R-288. (Emphasis added).

(2) Almost the same situation prevails with respect to the trial court's alleged[7] refusal to permit Government counsel to ask his witness Haeberle his estimate of the cost of conversion: (a) two other Government witnesses had already put the Government repair and conversion figure into the record on cross-examination (Barber, R-353, R-354; Reilly, R-506; R-508); (b) Government counsel *did not ask* Haeberle for his figure: "I am just asking whether he had a judgment of a figure, *not to state the figure*" (R-545). And he apparently *never intended* to ask his witnesses for the figure. See transcript of pre-trial conference at page 23 (Appendix hereto): "I am not going to ask him that" [the cost of repairs or conversion]. Nor did he ask either Barber or Reilly this question on direct examination. How can it be reversible error to rule out a question which was never asked?

(3) The jury had *already heard* (1) Storey's answer (R-458) to the *single* question asked by Government counsel on re-direct, and (2) his categorical, detailed statement, on direct examination, as to the bad condition of the plumbing and heating systems. The trial Court's action in sustaining the objection to this kind of question, which Storey had already answered, could not possibly have had any effect on the jury, especially since they had already heard the answer and were *not instructed to ignore it or any of Storey's testimony* given on either direct or re-direct examination.

(4) The trial Court's refusal to hear Steiger, a tax assessor, on the subject of whether the owner, and real estate and tax men in Pennsylvania, recognize a difference

7. See Notes 2 and 3.

between "fair market value" in condemnation cases and "market value" in tax assessment cases, could not have seriously affected the jury's decision. Steiger's *opinion* could not affect any weight the jury might give to the differences between the owner's valuation of the property for sale purposes and his estimate of the fair assessment for tax purposes. They had heard Government counsel's long cross-examination of Mr. Greenfield on this subject (R-67-72) and they were instructed by the trial court that "market value always remains the same" (R-690, 691). Moreover, as pointed out in (2) below, the Supreme Court of Pennsylvania, has said that it is common knowledge that in Pennsylvania tax assessment figures are "ridiculously low" compared to actual market value, and the *jury had told the trial court, in response to his question, that they understood this situation* (R-72).

Petitioners submit that this Court should adopt Judge Goodrich's dissent and summarily reverse the erroneous decision of the majority below. Such action requires no argument and would be justified under Rule 61, the new "harmless error" statute, 28 U. S. C. § 2111, and the principles set forth in *Kotteakos v. United States*, 328 U. S. 750, at 764.

(b) The Courts of Appeals which have considered this question in condemnation cases have acted on the practical philosophy and the sound reasoning underlying Rule 61. This decision is an unwarranted departure from that philosophy and reasoning.

The court below itself said in a prior condemnation case, *Miller v. United States*, 137 F. (2d) 592, 594, that:

> "It is well settled that when a verdict is within the range of the testimony as to the value of property, it will not be disturbed on appeal, since the damage sustained in a case of this type is never a matter which may be proved with absolute mathematical certainty . . . Plaintiff's contention in this respect therefore

lacks substantial merit. It cannot be said that the verdict is arbitrary or inconsistent with the evidence of market value."

And in the same case, after examining numerous objections to rulings on evidence, the court below said:

"Plaintiff has thus had a fair trial by an impartial court and jury. We do not see any irregularities in the case which would require a reversal."

Similarly the court below, in *United States v. Certain Parcels of Land,* 145 F. (2d) 374, 376, said in an opinion by Judge Goodrich, who dissented in this case:

"The case went to the jury under a clear charge of which neither party complains and in which the criterion for determining the amount of recovery was clearly stated. The verdict was for considerably less than the estimates of the plaintiff's witnesses, although more than the figures given by the Government witnesses. We find no reversible error in the proceedings."

To the same effect are the rulings of the court below in *United States v. 3.544 Acres of Land,* 147 F. (2d) 596, 601, and in *United States v. Certain Lands,* 183 F. (2d) 320, 322. In the latter case, the court said:

"Finally, it is difficult to see that clear error exists, for the evidence of value was highly conflicting and the compensation awarded is within the range of the evidence. Porrata v. United States, 1 Cir., 1947, 158 F. (2d) 788, 791."

In the *Porrata* case, cited by the lower court, the Court of Appeals for the First Circuit had said:

"All that needs to be said is that the evidence in this case is conflicting, that its credibility is for the District Court, and that the award is within the range

of the testimony. Under these circumstances the award cannot be set aside on appeal."

The Court of Appeals for the Eighth Circuit has said:

"The value so determined by the jury was within the scope of the testimony, and hence, it is sustained by substantial evidence. We do not pass upon the weight of the evidence, and the trial court has denied defendant's motion for a new trial. In these circumstances, the verdicts, being supported by substantial evidence, even though there may be a conflict in the evidence, must be sustained." *Foster et al. v. United States,* 145 F. (2d) 873, 877.

The Court of Appeals for the Ninth Circuit has said:

"In proceedings of this character, a judicial discretion in admitting or rejecting evidence as to value is vested in the trial court, and where no abuse of that discretion is shown, such rulings should not be disturbed on appeal." *United States v. Block,* 160 F. (2d) 604, 607.

The Court of Appeals for the District of Columbia Circuit has said:

"We think it unnecessary to state and consider these assignments in detail; for a careful examination of the record shows us that they were not errors of law, but were merely the exercise of the broad discretionary power vested in the trial court, particularly in a land damage case." *United States v. Nickerson et al.,* 2 F. (2d) 502, 503.

The Court of Appeals for the Eighth Circuit has said:

"That the trial judge *might have* admitted their opinions or *that we might think he should have admitted* them, *does not demonstrate that he was without discretion to exclude them.*" *Love et al. v. United States,* 141 F. (2d) 981, 984. (Emphasis added.)

Similar holdings by other Courts of Appeals are found in the following cases:

Second Circuit:

United States v. Lambert, 146 F. (2d) 469, 471-473.

Phillips v. United States, 148 F. (2d) 714, 716-717.

Fourth Circuit:

United States v. 25.406 Acres of Land, 172 F. (2d) 990, 993, 995.

United States v. Prettyman, 142 F. (2d) 891, 893, 894.

Fifth Circuit:

United States v. Savannah Shipyards, 139 F. (2d) 953, 957.

Seventh Circuit:

United States v. 2.4 Acres of Land, 138 F. (2d) 295, 297.

Eighth Circuit:

United States v. Becktold Co., 129 F. (2d) 473, 479.

Tenth Circuit:

United States v. Chicago, B. & Q. R. Co., 82 F. (2d) 131, 140.

District of Columbia Circuit:

Loughran v. United States, 64 F. (2d) 555.

The other excerpts printed in a footnote hereto [8] also clearly demonstrate that over the years the Courts of Ap-

8. "The verdict of the jury is well within the limits of the testimony as to value and is supported by competent testimony, and for aught that we know the jury did not take into consideration in fixing fair market value the evidence as to the 7½ per cent paid to Chatham Construction Company or the expenditures in an effort to float a bond issue. But even if error is shown in the receipt of evidence there should not be a reversal, unless it appears from the whole record that the error is prejudicial. Considering the entire record we do not think a reversal is required, particularly when the error was merely in introduction of evidence on a collateral question, and when there is ample competent evidence in the case to support the verdict of the jury. The jury could have ignored the testimony which we find to have been incompetent and still have found ample support in competent evidence for its verdict." *United States v. Savannah Shipyards, Inc.*, 139 F. (2d) 953, 957.

"A careful examination of the record leads us to the conclusion that there was no error in the rejection of the motion for a mistrial or in the rulings of the trial judge as to the evidence. The judge below did everything possible to re-

peal have uniformly followed the rule that in condemnation cases if, as in this case, there is substantial evidence to

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move the impression made by the questions of the discharged juror; the charge of the judge to the jury was fair and clear and there was no objection to it; the verdict of the jury was not so excessive as to show that the jurors were unduly influenced by anything that happened at the trial.

The average value fixed for the property in question by the Government witnesses was $7,927 and the average value placed by the appellees' witnesses was $18,743, and in the opinion of the trial judge the verdict was not excessive. He heard the witnesses, saw their demeanor on the witness stand and was familiar with the atmosphere surrounding the trial. We cannot find any sufficient reason for a reversal of the judgment which is accordingly affirmed." *United States v. Prettyman et al*, 142 F. (2d) 891, 894.

"Of course an expert witness may not, under the guise of giving the basis of his opinion, lug in evidence which is incompetent or irrelevant, nor should he be permitted to go into the grounds of his opinion in such way as to confuse or mislead the jury; but the scope of such examination is a matter properly committed to the sound discretion of the trial judge, who should be careful, as was the trial judge here, to see that false issues are not suggested to the jury and that they are not otherwise misled. See United States v. Prettyman, 4 Cir., 142 F.2d 891; United States v. Becktold Co., 8 Cir., 129 F.2d 473; United States v. Block, 9 Cir., 160 F.2d 604. This is in accord with the modern trend in the law of evidence favoring a wide rule of admissibility, with discretion on the part of the trial judge to exclude evidence the probative value of which is outweighed by the risk that its admission will result in a useless waste of time or in confusing or misleading the jury. See A.L.I. Model Code of Evidence Rule 303." *United States v. 25.406 Acres of Land, etc., In Arlington County, Virginia, et al*, 172 F. (2d) 990, 993.

"While the reception of this evidence may well have constituted technical error, it was harmless in the light of the facts that the verdict was for $240,000; that the total cost of the work actually done by appellee was more than $312,000; that the finding of the commissioners in favor of appellee was more than $280,000; *and that it took seventy-five days to try the case.* This last consideration has been held to obviate reversal, when the amount involved was, as here, negligible in comparison with the whole amount in controversy, and with the expense of another trial. United States v. River Rouge Improvement Co. (C.C.A.) 285 F. 111, loc. cit. 117. So, in this situation resort may be had to the statute of jeofails (section 391, title 28, U.S.C., 28 U.S.C.A. § 391), and the error be proclaimed harmless in view of the situation we have described above." *United States v. Chicago, B. & Q. R. Co.*, 82 F. (2d) 131, 140. (Emphasis the court's.)

"The ascertainment of [just] compensation is not controlled by artificial rules or a general formula, but is measured in various ways depending upon the circumstances of each case. All that is required, is that there be a reasonable judgment having its basis in a proper consideration of all relevant facts appearing in evidence. United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. —, and Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146, 45 S. Ct. 465, 69 L. Ed. 890. And so, where the different theories and processes (approaches) submitted by witnesses for ascertaining the value of property taken lead to widely differing results, and the opinions of the witnesses themselves are conflicting and wholly irreconcilable, and there is sufficient evidence upon which the verdict may be sustained, the verdict will not be disturbed, unless it is manifest, from all the circumstances in the case, that the jury adopted a false theory in arriving at their conclusion." *United States v. 2.4 Acres of Land, More or Less*, 138 F. (2d) 295, 297, 298.

support the conclusion of the trier of facts as to just compensation, and that finding is within the range of the evidence of the value, the judgment will not be reversed on appeal in the absence of clear error on a point concerning the fundamental issue of value or a clear abuse of discretion in rulings on evidence.

Petitioners submit that the court below, which has previously followed this rule, departed from it in this instance and that its action in so doing is thus in conflict with the uniform general rule, as well as Rule 61.

Accordingly, petitioners submit that this court should grant certiorari, reverse this judgment and reinstate the judgment of the District Court. We believe this question does not require argument and that on this point alone a summary reversal would be justified, as indicated in (a) above.

2. The decision of the Court of Appeals is based on such a flagrant misstatement of the evidence and the District Court's rulings thereon that this Court, in the exercise of its supervisory powers, should reinstate the judgment of the District Court.

(a) Contrary to the Court of Appeals' statement (R-740, R-772), Government counsel *was* permitted to ask petitioners' witness, Barnard, on cross-examination, his estimate of the cost of repairs as of the time of taking (R-282), and Barnard answered the question (R-283-284).[9] The only question ruled out (R-285-286) concerned his esti-

9. Indeed, in the Brief of the United States to the Court of Appeals, filed with and certified to this Court, the Government said, at page 23: ". . . Government counsel asked the witnesses for the plaintiffs on cross-examination what the cost would be to repair and convert the building to the use they envisioned. They estimated or considered a cost of from $250,000 to $400,000 (App. 120a, 205a, 242a, 249a, *283a-284a*)". (Emphasis added.) This last page reference—283a, 284a—is to Barnard's *answer* to the question which the Court of Appeals states the Government was not permitted to ask!

mate of depreciation in value of the property in *February of 1948* because the S. E. C. failed to make repairs during its occupancy of the building, which ended at that time—February of 1948, *three years before the taking* (R-55, R-280). Thus, this ground of reversal relied upon by the Court of Appeals, and reiterated in its corrected opinion, is based on a misstatement of the evidence and the ruling thereon.

(b) Similarly, and contrary to the Court of Appeals, statement (R-740), Government counsel was *not* denied the right to ask Government witness, Haeberle, the amount of his estimate of the cost of repairs and conversion. *He did not even try to ask Haeberle that question.* During the colloquy, Government counsel said: "I am just asking whether he had a judgment of a figure, *not to state the figure*" (R-545). And he *never* was asked to state his figure. Indeed, it appears that Government counsel never intended to ask any of his witnesses for that figure because at the pre-trial conference he said: *"I am not going to ask him that"* (See Appendix to this Petition, page 24). Similarly, Government counsel agreed with the Court's handling of this issue each time it was raised (R-316, 317, 382, 429, 445, 466, 473-475, 545). Thus, this ground of reversal is also contradicted by the record.

(c) Contrary to the Court of Appeals' statement (R-742), the District Court did *not* strike out all Storey's re-direct testimony. The trial judge merely *sustained an objection* to a single question *which had already been answered* (R-458). He did not instruct the jury to ignore the testimony. And, in any event, Storey had already testified, not as an *opinion*, but as a *fact*, that every part of both the heating and plumbing systems was "in bad shape" or "inoperable" or "badly rusted" or in a "bad state of repair" or some similar, categorically stated bad condition (R-431-

436). The record thus shows that, rather than striking out the testimony, the District Court merely sustained an objection and did it much too late to detract from any effect Storey's direct testimony might have had. The Government was *not* denied "reasonable latitude" in this respect —the jury heard *all* its evidence.

(d) Contrary to the Court of Appeals' statement (R-745, and note 10, R-745) the Government witness Steiger could not have rebutted Mr. Greenfield's statement that, in the owner's opinion, the "fair market value" for the property exceeded the "market value" for tax purposes. First of all, Steiger could not possibly testify as to *another man's opinion,* much less contradict him as to what his opinion is. Secondly, Steiger could *not* have testified that under the law of Pennsylvania these two factors are the same, because the Supreme Court of Pennsylvania stated long ago that "It is a well-known fact that from the beginning of our state government to the present time in nearly every section of the Commonwealth the *assessed value of property is ridiculously low as compared with actual value." Delaware, Lackawanna & Western Railroad Company's Tax Assessment* (No. 1), 224 Pa. 240, 247, 73 Atl. 429. This wide disparity was noted by this Court in Chief Justice Hughes' opinion in *Cumberland Coal Co. v. Board of Revision,* 284 U. S. 23, 28. Steiger, a lawyer, could not have truthfully testified otherwise.

The District Court's rulings on these *four questions* were the only basis for reversal the Court of Appeals could find in this week-long trial covering 700 pages of the printed record. None of them have any basis in the record—all of them are contradicted by the record.

CONCLUSION.

For the foregoing reasons, Petitioners pray that a writ of certiorari issue and that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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APPENDIX.

Rule 61 of the Federal Rules of Civil Procedure, 28 U. S. C. § 61.

"Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Excerpt (Pages 48-50) from Transcript of Pre-Trial Conference Held April 17, 1952.

"THE COURT: The question of repairs per se I do not think is of much concern. I think that in the overall picture the factors that made up his judgment are subject to cross-examination, but I do not think that on direct examination he should be asked to cover the question of repairs at all.

"MR. TODARO: That must be his witness's direct examination.

"THE COURT: I do not care whether it is your witness. It does not make any difference whose witness it is, but I think in cross-examination you could ask him——

"MR. TODARO: What factors he considered.

"THE COURT: —what factors influenced his judgment.

"MR. TODARO: Yes, and then he can relate them.

"THE COURT: But when he gets into saying: Well, I think it ought to have a marble floor, I think those are the

things that ought to be excluded. He may have had a different idea. Some experts may want to repair it to bring it into better than a first-class condition. What are your criteria as to the fundamentals to be considered in a building to be used for a business structure? Repairing it could run into very large sums of money. One expert may think that one coat of paint would be enough, another would say three are necessary. When you get into repairs I think you get into a pretty dangerous field.

"MR. TODARO: Certainly we have a right by way of cross-examination to test the extent to which——

"THE COURT: An expert is qualified to give his judgment.

"MR. TODARO: Yes, sir.

"THE COURT: Now, that is another generality. We never disagree on principles, it is always on their application that we disagree.

What do you have in mind specifically?

"MR. TODARO: Shouldn't I be able to ask his witnesses whether they observed this about the condition of the building, whether they observed that, whether they observed the other thing, to determine the scope and extent of their observations?

"THE COURT: Yes. Did you examine the building? Did you examine the floor? Did you make a survey of the building? But I do not think you can say what the items are.

"MR. TODARO: Yes. If his witness can do that in a walk from the fourteenth floor to the basement then that is up to the jury, it is something for the jury to consider.

"THE COURT: But I do not think you can get into the question of: *What do you think this would cost to repair?*

"MR. TODARO: *I am not going to ask him that.*" (Emphasis added.)

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In the Supreme Court of the United States

October Term, 1953

No. 556

JAMES F. HICKEY, an Individual, and BANKERS SECURITIES CORPORATION, a Corporation,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (R. 720-721) on the denial of the Government's motion for a new trial is not reported. The opinion of the court of appeals (R. 731-746), as corrected (R. 772-773), is reported at 208 F. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1953 (R. 746). A petition for rehearing was denied on December 11, 1953 (R.

773), and the petition for a writ of certiorari was filed on January 29, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 61 of the Federal Rules of Civil Procedure, the errors committed by the trial court justified the court below in reversing the judgment and ordering a new trial in order to achieve substantial justice.

2. Whether the errors found by the court below were based upon misunderstandings of the record.

STATEMENT

The United States instituted this condemnation proceeding on February 6, 1951, at the request of the Secretary of the Army, to acquire a lot and building, known as the Penn Athletic Club Building in downtown Philadelphia, for military purposes (R. 1). On the same day a declaration of taking was filed and the sum of $1,250,000 was deposited with the court as estimated just compensation (R. 1).

The property involved includes a 14-story building constructed in 1926 for use as a club (R. 25). It contained stores on the first floor, two swimming pools, a ballroom with balcony and stage, a dining room extending up two floors, a grill room, many private dining rooms, lounges, tennis courts, a gymnasium, etc., and eight floors of sleeping rooms and baths (R. 27-36).

A reorganization of the club which owned the property was had in 1940 under bankruptcy proceedings, but thereafter the club was unable to maintain the payments so that the property was taken over in 1942 by the Girard Trust Company, trustee for the bondholders (R. 576). From 1942 to 1948, the property was leased to the Securities and Exchange Commission (R. 55, 577-578). During that period, the Girard Trust Company "endeavored to interest various purchasers" (R. 579). In 1946, the property was exposed "to an actual open sale" and bids were asked provided they exceeded $1,750,000 (R. 579). No sale was made as a result of that solicitation (R. 580).

In April 1948, the real estate firm of Albert M. Greenfield & Company made an offer to purchase the property for $1,250,000 on behalf of the Bankers Securities Corporation, through a nominee, James F. Hickey (R. 52-54, 63, 66, 580-581). The purpose of the offer was to restore the property to the club at that price (R. 51-52, 142-145).

The directors of the Girard Trust Company presented the offer to the court for approval (R. 580). The court required that the sale be advertised in Philadelphia, New York, and Chicago for the possibility of a higher bid (R. 581, 583-584). None was received so the property was sold on August 30, 1948, for $1,250,000 to the nominee, James F. Hickey (R. 586).

The Penn Athletic Club was unable to secure a sufficient vote of its members to approve purchas-

ing the property (R. 145). Although Albert M. Greenfield & Company was authorized to sell or rent the property it remained vacant from 1948 to the present taking (R. 54, 63, 123-125, 136-137, 177, 182-184, 250, 271, 558). In this period, James F. Hickey filed appeals for reduction of the real estate assessment on the property for the years 1949-1951, in which he stated under oath that the market value was $1,250,000 (R. 594, 597-598).

In the jury trial on the condemnation, the petitioner adduced testimony of fair market value ranging from $3,880,000 to $3,150,000 (R. 61, 72, 75, 172, 238, 268). The Government's witnesses testified to values from $1,575,000 to $1,500,000 (R. 344, 493, 548).

The jury returned a verdict, awarding $2,100,000 (R. 717). Judgment was entered on July 17, 1952, in that sum with interest at six per cent on the deficiency of $850,000 (R. 719). A motion by the Government for a new trial was denied (R. 720). On appeal by the Government, the court of appeals reversed the judgment on October 14, 1953, for the errors discussed hereafter, Judge Goodrich dissenting (R. 731).

ARGUMENT

This case does not present any new or important issue on valuation in condemnation proceedings. The court of appeals merely returned the case for a new trial because of the exclusion of pertinent competent evidence on the valuation issue. This basis of the decision does not warrant the granting

by this Court of a writ of certiorari and analysis of the petition makes it clear that the claims there made are unfounded.

1. There is no conflict with Rule 61, F.R.C.P., relating to "harmless error", as interpreted by this Court, or with those decisions of courts of appeals which have not reversed certain condemnation judgments on matters of evidence (Pet. 3, 10-18). Rule 61 is expressly limited to matter "which does not affect the substantial rights of the parties." "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation." *McCandless* v. *United States,* 298 U. S. 342, 348. In the same case, this Court said of the almost identical predecessor (28 U.S.C. 391) to Rule 61: "This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial" (pp. 347-348). *Kotteakos* v. *United States,* 328 U.S. 750, 764, cited by petitioners (Pet. 11, 13), also allows use of the "harmless error" rule only where "the conviction is sure that the error did not influence the jury."

The decisions of the courts of appeals, relied upon by petitioners (Pet. 13-17), do not support their proposition (Pet. 8) that a condemnation judgment may not be reversed for rulings on admission of evidence because such questions are

within the sole discretion of the trial court. There is no such law in those decisions or elsewhere as to evidence directly affecting the issue of value. The importance of the evidence involved here to the issue of value will be made plain in the following discussion of the contents of the record.

2. The decision of the court of appeals was not based on misstatements of the record requiring review and reversal by this Court. (Pet. 3, 18-20). The following facts from the record as to each situation urged by petitioners amply sustain the correctness of the decision below.

The Government sought to establish that to put this unusual building into adequate condition for the highest and best use testified to (an office building) required expenditure of a considerable sum in repairs and conversion. This, being a matter which a prospective purchaser would consider, entered importantly into the issue of market value. *Olson* v. *United States,* 292 U.S. 246, 257. But the Government was not allowed to develop this at all in its case-in-chief.[1]

The Government sought to introduce estimates of cost through an architect and construction engineer, a civil engineer, and a mechanical engineer, engaged in such work (R. 314-316, 380-381, 427-428, 465, 467). The court refused the testimony

[1] Even in cross examination of one of petitioners' witnesses, an objection to this line of testimony was sustained (R. 285-286).

on the ground that "I think you can only use that testimony in so far as it is the basis upon which any of your experts predicate their judgment. * * * he is called out of turn" (R. 316-318, 382-387, 429, 438, 442, 465, 466). But when the Government placed its valuation expert, Haeberle, on the stand, the court refused to allow him "to put a dollar value" on making the building "habitable for club purposes, or for one tenant occupancy" (R. 543-545). When he was asked "whether he had a judgment of a figure, not to state the figure." the court said: "No I think we will not go into this at all" (R. 545). When he was asked whether he took "the fact that the condition of the building needed repairs and rehabilitation into consideration in arriving at your opinion of fair market value" (R. 545), the court sustained an objection by petitioners' counsel, stating: "I think we ought to leave all reference to repairs and reconversion out" (R. 546). Thus, contrary to petitioners' assertions (Pet. 12, 19), the record more than supports the court of appeals' statement that the Government was not permitted to question "Haeberle, as to his judgment as to the amount that would be necessary to be expended on the building to make it habitable" and "would not allow the United States to prove this important element by way of witnesses offered by it" (R. 740).[2]

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[2] The fact that government counsel failed to oppose the court's directions on this issue, during a pretrial conference, cannot cure the error (Pet. 23-24).

On the same basic question of the need for extensive repairs, the Government's witness, Storey, a mechanical engineer, testified that his inspection of the building, two days after the taking, indicated that the pipes for water, drainage and heating were in a bad state of repair (R. 428-436, 459). On re-direct examination, he was asked whether subsequent events justified his opinion upon that inspection (R. 457). He replied that the uncovering of pipe and the cutting into it during renovation of the building disclosed a condition "worse than I had found it to be in the beginning" (R. 458-459). Upon motion by petitioners' counsel that *"all* this testimony be stricken out," (italics added) it was stricken and an exception allowed (R. 463-464). The ruling was erroneous. *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 397 (C.A. 2). It was certainly prejudicial when added to the other rejections of evidence concerning the need for repairs. The fact that the jury heard the testimony before it was stricken (Pet. 12, 19-20) does not affect the result. The court of appeals plainly did not misstate the record (Pet. 19).

Petitioners' witness, Greenfield, a beneficial owner of the property and a real estate broker, explained the difference between the market value of $1,250,000 sworn to for tax reduction purposes and his testimony here of a market value of $3,850,000 for the same period on the ground that a different standard of market value has "been accepted and acted upon by real estate people generally and the

taxing authorities in particular" (R. 55-58, 67-72). The Government sought to have its witness, Steiger, a lawyer and member of the Board of Tax Assessors of Philadelphia, testify on that point by way of rebuttal (R. 592-598). This was refused because he is not a real estate broker (R. 597, 743). As the discrepancy in the figures show, the question was important to the issue of market value here. The court of appeals correctly held that the Government should have been permitted to rebut the alleged view of the "taxing authorities" by such an authority. There were, thus, no misstatements concerning the record (Pet. 18).[3]

CONCLUSION

The decision below is correct. It presents neither conflict nor mistake. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] The court below held that other rulings of the trial court of which the Government complained were not a basis for reversal. If the petition for certiorari should be granted, the Government will again press this point.

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